Disability Access Lawsuits: An Epidemic Affecting California Banks

Who is filing these lawsuits?

An Oakland based organization called Americans With Disability Advocates ("AWDA") and its Executive Director, George Louie, have filed over 350 disability access lawsuits against banks, retailers, homebuilders, wineries, bowling alleys and restaurants since the AWDA was formed in 1999. In the past year, approximately 100 have been filed against financial institutions. Typically, these plaintiffs are represented by one of three lawyers: Kim Mallory, Charla Duke or Nick Avtonomoff. Recently, Ms. Duke has filed a number of similar lawsuits on behalf of three other plaintiffs: Monroe Quinn, Yvonne Westbrook and Sam Choi.

What do these lawsuits allege? What do the plaintiffs (and their lawyers) want?

Typically, these plaintiffs will file several identical or nearly identical lawsuits at or about the same time in the United States District Courts for the Northern and/or Eastern Districts of California. Each lawsuit claims the conditions in a different branch did not comply with various state and federal statutes protecting access rights of persons with disabilities. Typical causes of action include alleged violations of the California Health & Safety Code § 19955, California Civil Code Sections 51 et seq. and 54 et seq., Americans With Disabilities Act of 1990, California Business & Professions Code § 17200 and claims of negligence.

The complaints almost always allege that the teller counters and writing tables are too high. They sometime allege other access violations such as problems with parking, doorways, paths of travel, ramps, and signage. They almost always claim that Mr. Louie or the other plaintiffs complained to managers about the alleged violations and that nothing has been done. However, based on what we can tell, no such complaints have actually been voiced. And it is likely that they never even visited the branch that is the subject of the lawsuit.

What do they want? $$$$$$ These plaintiffs appear to be looking for quick settlements and payment of attorneys' fees. They use threats of more lawsuits in an effort to extract larger pay-offs.

What is the law?

California: The California Building Code ("CBC") requires that new construction or alterations after January 1, 1982 comply with CBC regulations. California Civil Code § 54.3 provides for "actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages, but in no case less than one thousand dollars ($1,000), and attorney's fees". Effective January 1, 2002, California Civil Code § 52–which also provided minimum statutory damages of $1000–was amended to increase the minimum from $1000 to $4000.

Federal: The Americans With Disabilities Act of 1990 requires that new construction or alterations after January 26, 1992 comply with the ADA Design Standards (ADAAG). The ADA provides for injunctive relief and attorneys' fees.

What types of renovations/alterations trigger theses statutes?

- Renovations or modifications are considered to be alterations when they affect the usability of the element or space.
- Examples include installing a new teller counter, replacing fixtures, carpet or flooring, and replacing an entry door.
- Simple maintenance such as repainting a wall is not an alteration.

Banks Have An Ongoing Obligation to Remove Barriers: Under the ADA, all banks (regardless of when they were constructed and/or whether any alterations have been done) are required to correct inaccessible features that are covered in the design standards, when doing so is "readily achievable."

What is readily achievable? "Readily achievable" means easily accomplished without much difficulty or expense. This will vary based on the size and resources of the business and economic conditions.

Priorities for Barrier Removal: The Disability Rights Section of the U.S. Justice Department recommends that you remove barriers in the following order:

1. Provide access to the business from the public sidewalks, parking, and public transportation.
2. Provide access to the areas where goods and services are made available to the public.
3. Provide access to public toilet rooms (if toilet rooms are provided for customer use).

Substantial compliance is not a defense. Liability can be based on technical violations, and the plaintiff does not have to prove that the defendant intended to discriminate against persons with disabilities.

Some preventative measures banks can/should take to avoid these types of suits and/or limit their liability if they have been targeted:

1. Audit your branches for compliance either by hiring an access consultant or by having your managers trained to use access compliance checklists. Immediately correct any violations.
2. Always be on the lookout for access barriers that could be removed relatively easily. Relocate items such as planters, trash cans, tables that block or partially obstruct entrances and paths of travel.
3. Make sure you have an accessible entrance as well as a sign identifying it as such. On non-accessible entrances, provide directions to the accessible entrance.
4. Have at least one accessible teller counter (no higher than 28 to 34 inches). Consider using a fold down shelf as an equivalent alternative.
5. Have at least one accessible writing table (no higher than 34 inches and at least 36 inches long).
6. If parking is provided, make sure you have the appropriate number of accessible spaces, the required loading zone and signage.
7. Make sure that door hardware does not require gripping and/or a lot of force.

Steps to take after you learn a lawsuit has been filed:

1. Tender to your insurance broker and carrier. Do not fail to do so just because claims involve alleged statutory discrimination.
2. If there has been a violation of the ADA or state law, your goal should be to settle quickly (to avoid being on the hook for large awards of costs and attorneys' fees).

There are general steps you can take to minimize the size of the settlement amount you will pay to plaintiffs, their lawyer (and your lawyer):

- First, find out immediately whether there are any access violations at the targeted branch. If so, promptly correct them and recognize that you will likely be responsible for the minimum statutory damages under Civil Code §§ 54.3 and/or 52 and some amount of attorneys' fees.
- Make a record that the lawsuit is unnecessary, either because there are no violations or work has been planned and is underway. Therefore, a prompt letter responding to the allegations in the complaint is an important liability avoidance or minimizing step.
- Ask for any reports that the plaintiffs have obtained detailing when they visited and what technical violations they uncovered.
- As these cases are typically filed in federal court, take advantage of the initial ninety-day discovery freeze. This means that plaintiffs' counsel should have engaged in minimal work (and incurred minimal fees) if you can settle early.

- Attempt to relate all cases to the same judge. This will minimize the litigation expenses and plaintiffs' potential attorneys' fees. It will also educate the judge that plaintiffs have in fact "churned" the litigation to maximize fees.
- Arrange an early settlement conference or mediation. Take advantage of the Court's Alternative Dispute Resolution ("ADR") Program.
- Initiate informal settlement negotiations. Let plaintiffs know that you aren't going to make a substantial settlement offer—no more than $5000 per branch (including attorneys' fees).
- If they do not respond to your settlement offer (and they probably will not), consider filing a Rule 68 offer of judgment which precludes them from recovering attorneys' fees incurred after the date of the offer if they do not do better than your offer at trial. This forces them into a more reasonable settlement posture.
- Negotiate a low cost settlement. Prior to the increase in statutory damages under Civil Code § 52, you could expect to pay anywhere from $2000 to $5000 per branch if there were violations. Today, in light of the increase, you should expect to pay anywhere from $5000 to $7000 per branch if there are violations. Insist on a full and general release of all claims, both known and unknown, involving all of your branches, including a general release under California Civil Code Section 1542.
- Initially insist that plaintiffs agree not to bring any other suits against any of your other bank branches. If plaintiffs balk at a settlement precluding future lawsuits, attempt to negotiate a notice and opportunity to cure provision, under which plaintiffs must first provide you with notice of alleged violations and a reasonable period to rectify the claimed unlawful conditions before filing a lawsuit.

Other costs you can expect to incur:

1. Access consultant: fees range from about $2000 to $4000 for a review of and report on 2-5 branches.
2. Attorneys' fees: if the suit settles early, before discovery, expect to pay your attorney about $3,000 to $5,000 in fees if the suit only alleges violations in a single branch, and if the violations are "standard", e.g. teller counters and writing desks are too high. If the claims involve more branches and more complex violations, attorneys' fees will increase. For example, if plaintiffs file suits alleging violations at four of your branches, your attorneys' fees may be in the $15,000 to $20,000 range.

This summary was prepared by the lawyers of McCutchen, Doyle, Brown & Enersen, LLP, who provide preventative advice and handle ADA access and employment discrimination cases. For further information, contact James Rockett, Chair, Financial Services Group (jrockett@mdbe.com), Michael Loeb, Chair, Labor and Employment Group (mloeb@mdbe.com), Colleen Severance (cseverance@mdbe.com), or Alan Berkowitz (aberkowitz@mdbe.com).